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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., *et al.*,
Petitioners,

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE BANK OF NEW YORK COMPANY, INC. AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The Bank of New York Company, Inc. ("Bank of New York") respectfully moves pursuant to Rules 36.3 and 42 of the Rules of this Court for leave to file the brief annexed hereto as *amicus curiae* supporting neither petitioners nor respondents. Although petitioners, the Solicitor General, and two of the non-federal respondents have consented to the filing of the brief, three of the non-federal respondents have declined to do so.

As more fully explained in the brief under the heading "Statement and Interest of *Amicus Curiae*," Bank of New York is a New York-based bank holding company that

contracted to acquire the subsidiary banks of petitioner Northeast Bancorp, Inc., located in Connecticut, and applied to the Board of Governors of the Federal Reserve System ("Board") for approval of that acquisition. The Board denied approval, relying on its decision in this case. Bank of New York's petition for review is being held in the Second Circuit pending the Court's disposition of this case, which will almost certainly control the outcome in Bank of New York's case.

Bank of New York's position is that under the plain language of the Douglas Amendment, the Connecticut and Massachusetts statutes here in issue operate to permit the acquisition of Connecticut and Massachusetts banks by bank holding companies located in any State and, therefore, present no constitutional issue. Consequently, Bank of New York submits, both the transactions that are the subject of this case and its own proposed transaction may lawfully proceed. None of the parties advocates Bank of New York's position, which would enable the Court to dispose of this case without reaching the constitutional questions raised below.

Accordingly, Bank of New York prays that the Court grant this motion for leave to file its brief.

Respectfully submitted,

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COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE BANK OF NEW YORK COMPANY, INC., AS *AMICUS CURIAE*

The Bank of New York Company, Inc. ("Bank of New York") submits this brief as *amicus curiae* to urge the Court to affirm on other grounds the judgment of the United States Court of Appeals for the Second Circuit, reported at 740 F.2d 203 (2d Cir. 1984). This Court can, by correctly reading the relevant statutory language, uphold the basic constitutional principles involved without reaching the constitutional issues raised below.[1]

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[1] The decision of the Second Circuit affirmed: the order of the Board of Governors of the Federal Reserve System (the "Board"), dated March 26, 1984, approving the merger of Bank of New

(footnote continued on following page)

Statutes Involved

The statutes involved are set forth in Petitioners' Briefs. The statute which is the principal focus of this brief is the "Douglas Amendment," Section 3(d) of the Bank Holding Company Act, 12 U.S.C. § 1842(d)(1982), which reads as follows:

> "Notwithstanding any other provision of this section, no application (except an application filed as a result of a transaction authorized under section 1823(f) of this title) shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the state laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest."

(footnote continued from preceding page)

England Corporation and CBT Corporation, 70 FED. RES. BULL. 374 (1984); the Board's order, also dated March 26, 1984, approving the acquisition by Hartford National Corporation of Arltru, Inc., 70 FED. RES. BULL. 353 (1984); and the Board's order, dated May 18, 1984, approving the acquisition by Bank of Boston Corporation of Colonial Bancorp, Inc., 70 FED. RES. BULL. 524 (1984) (together, the "Transactions").

Statement and Interest of *Amicus Curiae*

Bank of New York is a bank holding company registered under the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 *et seq.* (1982) (the "BHC Act"). Its principal subsidiary is The Bank of New York, a New York state trust company conducting a commercial banking business in New York. In February 1984, Bank of New York filed an application with the Board for approval to acquire the subsidiary banks of Northeast Bancorp, Inc. ("Northeast"), one of the petitioners in this case (the "BNY Application"). Northeast's subsidiary banks are located in Connecticut.

Bank of New York based its application on the Douglas Amendment, submitting that upon a proper reading of that provision, approval of the BNY Application had been authorized by Connecticut Public Act No. 83-411, "An Act concerning Interstate Banking" (the "Connecticut Interstate Act"), which authorized the acquisition of Connecticut banks by holding companies based in other New England States. Bank of New York contended that the plain meaning of the Douglas Amendment rendered state consent to entry by a bank holding company based in any other sister State consent to entry from all sister States, and that any attempt by a State to limit its consent to entry from particular States was, therefore, simply ineffective as a matter of federal statutory law. Bank of New York's application was denied by the Board by an order dated May 15, 1984, *Bank of New York Company, Inc.*, 70 FED. RES. BULL. 527 (1984), and a petition for review of the Board's decision, timely filed with the Second Circuit, is being held pending the Court's disposition of this case.[2]

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[2] The Board's Order is appended hereto as pages 1a-8a. Although it denied Bank of New York's application, the Board did not reject

(footnote continued on following page)

It is Bank of New York's position as *amicus curiae* here—as it was its position as applicant before the Board—that under the plain language of the Douglas Amendment, it is unnecessary for this Court to reach the constitutional issues decided below and raised in the Petition in order to decide this case. Because none of the parties has presented this position, Bank of New York respectfully submits this brief in aid of the Court's resolution of the important questions which have arisen as a result of the enactment of state regional banking statutes such as the two here in issue, the Connecticut Interstate Act and MASS. GEN. LAWS ANN. Ch. 167A, § 2 (Supp. 1984) (the "Massachusetts Interstate Act") (together, the "Interstate Acts").

Summary of Argument

Congress through enactment of the Douglas Amendment imposed a federal prohibition on the acquisition of banks located in one State by bank holding companies located in another. At the same time, Congress made provision in the Amendment for any State to remove the prohibition as to the acquisition of banks located in that State by enacting a statute specifically authorizing acquisition by "an out-of-State bank holding company."

(footnote continued from preceding page)

Bank of New York's analysis of the plain meaning of the Douglas Amendment. Instead, the Board simply chose to interpret the statute in a manner it termed consistent with prior "Board and judicial practice" so as to allow the States "to limit or restrict entry by out-of-state bank holding companies." (4a-7a). Nothing in the analysis advanced by Bank of New York before the Board and in this brief, however, would require disapproval of any transaction heretofore approved by the Board. On the contrary, as demonstrated *infra* at Points III and IV, Bank of New York's analysis is the only analysis which is fully consistent with the language of the BHC Act, the Board's prior practice, and the Board's approval of the Transactions.

Under the plain language of the Douglas Amendment, the absolute prohibition on such acquisitions imposed by Congress is lifted completely when a State authorizes local banks to be acquired by *any*, or a single, out-of-state bank holding company. Accordingly, in authorizing the acquisition of Connecticut or Massachusetts banks by out-of-state bank holding companies from certain other States—*i.e.*, in the language of the Douglas Amendment, to be acquired by "*an* out-of-State bank holding company"—the Interstate Acts eliminated the federal bar not only to the Transactions, but to the BNY Application and all similar transactions. Since the purported limitations in the Interstate Acts have no effect, they raise no constitutional issues regarding discrimination against sister States.

Although the decision of the court of appeals can be affirmed under a correct reading of the statute, its rationale and that of the Board cannot be accepted. Both erred in their reasoning in purporting to find in the Douglas Amendment an express authorization of discrimination on a regional basis and, therefore, in holding the Interstate Acts to be effective as geographically limited waivers of the Douglas Amendment's prohibition.

The Board also erred in assuming that a plain language reading of the Douglas Amendment would confront the States with an "all-or-nothing" choice in dealing with out-of-state bank holding companies. Even after removing the federal bar of the Douglas Amendment, a State may, under Section 7 of the BHC Act, 12 U.S.C. § 1846 (1982), exercise "a general power to enact regulations applicable to bank holding companies" in a manner consistent with the Commerce Clause. *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 48-49 (1980). Accordingly, state laws which regulate the activities of bank holding companies and are

not inconsistent with federal law may be valid either if they affect interstate and local holding companies equally, or if any "disparate burden" placed on interstate holding companies is only "incidental" and not excessive in relation to the local benefit secured. *Id.* at 43; *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

ARGUMENT

I.

The Connecticut and Massachusetts Interstate Acts Operate Under the Douglas Amendment as Consents To Entry by Any Out-of-State Bank Holding Company.

The Douglas Amendment prohibits the Board from approving an application by a bank holding company to acquire the shares or assets of a bank located outside the State in which its subsidiaries principally conduct their operations. There is, however, an exception in circumstances where

> "the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication."

The Connecticut and Massachusetts Interstate Acts specifically authorize acquisitions of local banks by out-of-state bank holding companies, but by their terms purport to limit such permission to bank holding companies from designated States. It is these purported limitations which give rise to petitioners' constitutional challenge. Since the limitations are ineffective under the Douglas Amendment, however, the Interstate Acts are not constitu-

tionally infirm, and the Board's approval of the Transactions was proper.

A. Under the Plain Language of the Douglas Amendment, the Federal Ban on Interstate Acquisitions Is Lifted Once a State Authorizes an Acquisition by an Out-of-State Bank Holding Company.

It is the basic rule of statutory construction that a statute is to be read in accordance with its plain meaning. *See, e.g., Burns* v. *Alcala,* 420 U.S. 575, 580-81 (1975); *Banks* v. *Chicago Grain Trimmers Ass'n,* 390 U.S. 459, 465 (1968). This precept is rooted in the separation of powers doctrine, since for an administrative or judicial body to reshape Congress's words would improperly override legislation which Congress has enacted. 2A SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION, § 45.09 at 29 (4th ed. 1973); *see also Heydon's Case,* 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638 (Exch. 1584).

The phrase "acquisition . . . of *a* State bank by *an* out-of-State bank holding company" (emphasis supplied) as used in the Douglas Amendment plainly means acquisition by "*any*," or a single, out-of-state bank holding company. Under consistent judicial authority, the words "a" and "an" generalize the subject which they precede, and when used in a statute mean "any." *See, e.g., United States* v. *Hudson,* 65 F. 68 (W.D. Ark. 1894); *Brooks* v. *Zabka,* 450 P.2d 653, 655, 168 Colo. 265 (1969); *Lindley* v. *Murphy,* 56 N.E.2d 832, 838, 387 Ill. 506 (1944); *Lewis* v. *Spies,* 350 N.Y.S.2d 14, 17, 43 A.D.2d 714 (2d Dep't 1973); *Deschane* v. *McDonald,* 86 N.W.2d 518, 520 (N.Dak. 1973); *Doherty* v. *King,* 183 S.W.2d 1004, 1007 (Tex. Civ. App. 1944); BLACK'S LAW DICTIONARY 3-4 (4th ed. 1951). *See also First National Bank* v. *Missouri,* 263 U.S. 640, 657 (1924), in which this Court concluded that the reference in the National Bank Act to "*an* office or banking

house" meant a single office. Thus, once a State authorizes the acquisition of an in-state bank by *an* out-of-state bank holding company, the federally imposed bar is no longer in effect as to other acquisitions.

If Congress had intended in the Douglas Amendment to restrict out-of-state entry by such class distinctions as a State might impose, it would have been a simple matter to do so by using a restrictive modifier like "such" when referring to the terms on which state law might authorize entry by an out-of-state bank holding company.[3] For example, Congress could have used the word "such" instead of the word "an" as the modifier of "out-of-state bank holding company." The Douglas Amendment's state-law authorization clause would then have read: "unless the acquisition of such shares or assets of a State bank by *such* out-of-state bank holding company is specifically authorized . . . ." Alternatively, the subject of the state-law authorization clause could have been expressed concisely as "such acquisition," in place of the much longer phrase "the acquisition of such shares or assets of a State bank by an out-of-state bank holding company." The Douglas Amendment's authorization clause would then have read: "unless *such acquisition* is specifically authorized. . . . " In either case, the use of the word "such" might then have been construed as congressional authorization for States to specify particular acquirors on a nondiscriminatory basis.[4]

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[3] In contrast to words like "a" or "an," the word "such" does not generalize the subject which it precedes, but refers to a subject already particularized elsewhere. *See, e.g., Luciani* v. *Certified Grocers of Illinois, Inc.*, 245 N.E.2d 523, 527, 105 Ill. App. 2d 448 (1969); BLACK'S LAW DICTIONARY, *supra*, at 1600.

[4] Even had Congress followed either of these courses, the statute would not have expressed the unequivocal legislative consent necessary for it to be construed to authorize discrimination among sister States. *See* Point II, *infra*.

Congress knew how to use a restrictive word like "such" in the Douglas Amendment when it wanted to, since that very word appears four times in the text of the Amendment. Congress's first two uses of the word "such," before the state-law authorization clause, refer to the particular bank holding company whose application is before the Board, and contrast sharply with its later use of the generalized "an." The structure of the Amendment itself thus provides an explicit contrast between specific and general references to bank holding companies:

> "[No] application shall be approved under this section which will permit any bank holding company . . . to acquire . . . any additional bank located outside the State in which the operations of *such* bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which *such* company became a bank holding company, whichever is later, unless the acquisition . . . of a State bank by *an* out-of-State bank holding company is specifically authorized . . . ."

Congress's use of these two different modifiers in referring to out-of-state bank holding companies *requires,* as a matter of statutory construction, that the distinction be given effect. *See, e.g., Citizens & Southern National Bank* v. *Bougas,* 434 U.S. 35, 44 (1977). The distinction simply is that in the one instance, "such," Congress was referring to a particular bank holding company, and in the other, "an," to any bank holding company.

Further support for this conclusion is found in Congress's use twice of the word "such" in the state-law authorization clause itself:

> "unless the acquisition of *such* shares or assets of a State bank by *an* out-of-State bank holding company

> is specifically authorized by the statute laws of the State in which *such* bank is located . . . ."

Both uses of "such" appear in context with the phrase referring to "*an* out-of-State bank holding company." Congress chose not to use the word of specification "such" when referring to an acquiring bank holding company in the same clause in which it used that word of specification when referring to the state banks to be acquired. That drafting decision is strong evidence that Congress had no intent in the Douglas Amendment to limit the class of out-of-state bank holding companies to "such" bank holding companies as state law might authorize.

In short, it is simply not possible to interpret the word "an" as synonymous with "such" when the latter is used twice in the same clause for other purposes. It cannot be assumed that in between these two usages of that term, and only several words apart, Congress used another term, "an," and yet intended it to mean the same thing as "such." [5]

Under the plain language of the Douglas Amendment, Connecticut's and Massachusetts' authorizations of bank acquisitions by out-of-state bank holding companies from other States triggered the "authorization exemption" of the Douglas Amendment as to acquisitions by holding companies from any State.

B. The Legislative History of the Douglas Amendment Does Not Demonstrate a Congressional Intent To Authorize States To Enact Geographically Limited Waivers of Its Absolute Prohibition.

As a general rule, resorting to legislative history is inappropriate when the meaning of a statute is clear on its

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[5] *See Board of Governors* v. *Agnew*, 329 U.S. 444, 447-48 (1947) (giving effect to the distinction made by Congress between the words "primarily" and "principally").

face. *See, e.g., TVA* v. *Hill,* 437 U.S. 153, 184 n.29 (1978); *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 197-201 (1976); *United States* v. *Oregon,* 366 U.S. 643, 648 (1961); *Gemsco, Inc.* v. *Walling,* 324 U.S. 244, 260 (1945). This basic rule of statutory construction should preclude any consideration of legislative history here. But even if reference be made to the legislative history, it cannot be read to contradict the statutory language. Indeed, we believe it to be conceded by the Board and the court of appeals that in 1956 Congress simply did not consider the prospect of a discriminatory state waiver similar to the Connecticut and Massachusetts Interstate Acts.[6] *Compare Bank of New England Corporation,* 70 FED. RES. BULL. at 385 *with* 740 F.2d at 207; *see also Iowa Independent Bankers* v. *Board of Governors,* 511 F.2d 1288, 1296 (D.C. Cir.), *cert. denied,* 423 U.S. 875 (1975).

Twenty-seven years ago, Senator Douglas, the other proponents of his Amendment, and the Amendment's opponents recognized that no State had passed enabling legislation of any sort and believed none would do so. *Compare, e.g.,* 102 CONG. REC. S6860 (remarks of Sen. Douglas) (April 24, 1956) *with id.* (remarks of Sen. Bennett) *and with id.* at S6861 (remarks of Sen. Bricker); *see also Senate Comm. on Banking and Currency, Amendments to S. 2577, Transcript of Proceedings in Executive Session* 6, 19 (March 6, 1956). There was therefore no discussion as to the effect

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[6] While there is no legislative history supporting the view that Congress authorized the States to enact limited waivers of the Douglas Amendment's prohibition, such legislative history as exists does suggest a congressional assumption that any waiver of the Douglas Amendment's bar would be comprehensive, consistent with the plain language analysis of the statute presented herein. *See* 102 CONG. REC. S6859 (April 24, 1956) (remarks of Sen. Douglas) (purpose of amendment is to prevent bank holding company expansion across state lines "unless the States give *them* explicit permission to do so") (emphasis added).

under the Douglas Amendment of any state legislation authorizing entry by out-of-state holding companies on a discriminatory basis, regional or otherwise. *See Iowa Independent Bankers, supra,* 511 F.2d at 1296. The legislative history simply cannot be read as supporting a federal incorporation of a geographically limited state entry statute when the issue was not considered at all.

While there are a number of references in the legislative history of the BHC Act to protecting the rights of the States, none of this discussion was in the context of a limited waiver of the Douglas Amendment's prohibition. The discussion of States' rights occurred instead in connection with the nonpreemption provision of the BHC Act (Section 7), which was introduced in the original House version of the Act and is discussed below. *Compare* H.R. 2674, § 9 ("Reservation of Rights to the States"), 84th Cong., 1st Sess. (1955) *with* 12 U.S.C. § 1846; *see also* S. REP. NO. 1095, 84th Cong., 1st Sess. 22 (1955).[7]

C. A Comparison Between the Language of the McFadden Act and That of the Douglas Amendment Supports This Conclusion.

The Douglas Amendment was modeled on the McFadden Act. *See* 102 CONG. REC. S6860 (April 24, 1956) (remarks of Sen. Douglas); H.R. REP. No. 609, 84th Cong., 1st Sess. 3, 15 (1955). Accordingly, a comparison between the two provisions is an important aid in construing the Douglas Amendment. *NCNB Corporation,* 68 FED. RES. BULL. 54, 59 (1982).

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[7] There is, moreover, not the slightest indication in the legislative history that Congress intended to afford to States in the Douglas Amendment rights which were broader than the constitutional standard implicit in Section 7. Brief of the Federal Respondent in Opposition, November 6, 1984, at 6 (there was "no congressional discussion of the specific types of action that the States might or might not take under the Douglas Amendment").

Both the McFadden Act and the Douglas Amendment place restrictions on bank expansion and then generally authorize expansion if permitted by state law. But at this point the comparability ends and the contrast begins. The McFadden Act uses language that specifically makes all limitations of state law applicable to national bank expansion by branching. It provides that a national bank may establish and operate new branches within a State in which it is located

> "if *such establishment and operation* are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and *subject to the restrictions as to location imposed by the law of the State on State banks.*"

12 U.S.C. § 36(c) (emphasis added).

Thus, under the McFadden Act, in order for a national bank to branch within the State in question, "*such* [branch] establishment and operation" must be authorized for state banks by the State's law. By using a word of limitation—"such"—Congress required that the specific type of transaction be authorized by state law.

Moreover, the McFadden Act eliminates any doubt as to the relevancy of state-law restrictions by explicitly subjecting national banks "to the restrictions as to location imposed by the law of the State on State banks." This formulation imposes on national banks—for branching purposes—all the limitations a State chooses to impose on state bank branching.[8]

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[8] As a result, both the potential and the criteria for intrastate branching by national banks vary widely from State to State. *Com-*

(footnote continued on following page)

In contrast, in the Douglas Amendment's authorization clause, Congress did not adopt parallel language incorporating directly or indirectly restrictions imposed by state law. Therefore, the Douglas Amendment enables States to authorize out-of-state bank holding companies in general to effect in-state acquisitions, but not selectively to authorize entry only by "such" out-of-state bank holding companies as they might prefer.

Congress had in the McFadden Act a ready model of how to adopt the full range of state law, and chose not to use it.[9] Instead, Congress gave the States the authority only to eliminate Congress's own prohibition against entry by out-of-state holding companies.

(footnote continued from preceding page)

pare, e.g., MASS. LAWS ch. 172, § 11 (permitting branching only within bank's home city or county) *with* MO. REV. STAT. ch. 362, 107-08 (limiting total number of branches which may be maintained or operated within a given county) *with* KAN. STAT. ch. 9-1111 (prohibiting branching altogether) *and with* N.J. STAT. 17:9A-19 (prohibiting branching by a bank with its home office in one city into a city in which another bank has its home office).

[9] In addition to the McFadden Act, Congress has expressly adopted state laws regulating banking in connection with the provision of trust services (12 U.S.C. § 92a (1984 Supp.)), the setting of interest rates (12 U.S.C. § 85 (1984 Supp.)), and the giving of security for the deposit of public funds (12 U.S.C. § 90 (1945 and 1984 Supp.)).

II.

The Douglas Amendment Cannot Be Read To Authorize State Discrimination Against Sister States.

The Board in this case did not address the analysis of the Douglas Amendment set forth above. Rather, it construed the statute by employing a peculiar circular analysis to find that the Amendment allowed limited waivers which discriminate against sister States: Beginning with the proposition that it regards state statutes as constitutional unless they are clearly and unequivocally unconstitutional, and recognizing that under *Lewis* prohibitions on entry by out-of-state holding companies cannot be justified under Section 7 of the BHC Act, 12 U.S.C. § 1843 (1982), the Board strained to find the necessary congressional consent in the Douglas Amendment itself. (A40-41).[10]

Thus, the Board adopted deference to state statutes as a canon for construction of federal statutory law, in essence holding that the BHC Act should be construed to validate otherwise unconstitutional state legislation unless another construction was "clearly and unequivocally" required. (A41). The court of appeals affirmed in a cursory opinion, according "substantial deference" to the Board and presenting little analysis of its own. (A29). The conclusion reached by the Board and the court of appeals, like the process by which it was reached, is patent error under this Court's decisions, and recognition of that error further demonstrates the validity of the construction of the Douglas Amendment here advanced.

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[10] "A" citations are to the Appendix to the Petition for a Writ of Certiorari.

In those "few unique federal statutes" which delegate to the States virtually plenary power over certain aspects of interstate commerce, Congress has used language which clearly and unmistakably accomplishes that purpose. *See International Shoe Co.* v. *Washington,* 326 U.S. 310, 315 (1945). Thus, in the McCarran-Ferguson Act, 15 U.S.C. § 1012 (1976), Congress stated that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." In *Prudential Ins. Co.* v *Benjamin,* 328 U.S. 408, 430 (1946), this Court held that such language was sufficient to confer on the States ability to restrict the flow of interstate commerce they would not otherwise enjoy. *See also Western and Southern Life Ins. Co.* v. *State of Equalization,* 451 U.S. 648, 671 (1981) (approving legislation under the McCarran-Ferguson Act designed to induce uniformity of taxation amongst the States); *Whitfield* v. *Ohio,* 297 U.S. 431, 438 (1936) *(construing* Hawes-Cooper Act, 47 U.S.C. § 60 (1957)) (prisoner-made goods "shall upon arrival [in a State] . . . be subject to the operation and effect of the laws of such State to the same extent and in the same manner as though manufactured in such State");[11] *In re Rahrer,* 140 U.S. 545, 562 (1891) *(construing* Wilson Act, 27 U.S.C. § 121 (1984 Supp.)) (intoxicating liquids or liquors "shall upon arrival [in a State or Territory] be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory"). Even in these instances, however, Congress has not suggested that the

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[11] The Hawes-Cooper Act was repealed by Pub. L. 95-473, § 4(b), 92 Stat. 1466 (1978).

States are free to pick and choose those other States with which they will allow commerce to be conducted.

It follows that had Congress intended in the Douglas Amendment to authorize state legislation lifting the federal bar to interstate bank acquisitions on *any* limited basis (let alone a discriminatory, regional one), it would certainly have used specific, clear language to that effect. There is, of course, no such language in the BHC Act.[12] Indeed, as discussed in Point I, above, the language of the Douglas Amendment is to the contrary.

The truly remarkable claim made by respondents—that Congress has authorized the States to form trading blocs, exclusionary of other States—is wholly unsupported and flies in the face of two centuries of our history as a single Nation sharing a single economic destiny. Rival trading regions were rejected by the Framers, and if they are to be

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[12] There is one instance where Congress itself created an exception to the general prohibition of the Douglas Amendment. In the Garn-St. Germain Depository Institutions Act of 1982, Congress authorized the acquisition of failing commercial banks and thrift institutions by out-of-state depository institutions, 12 U.S.C. § 1823(f) (1982); 12 U.S.C. § 1730a(m) (1982), subject to observance of specified priorities, *e.g.*, 12 U.S.C. §§ 1823(f)(6)(B), (C).

While Congress accorded in-state offerors priority over out-of-state bidders and offerors from adjoining States priority over other out-of-state bidders, *id.*, it did not create any sort of banking regions and its expressly stated preference for geographic proximity did not discriminate against any State or group of States. Moreover, that preference, like the higher priority for in-state offerors, was made secondary to other considerations. *See id.; see generally Citicorp*, 70 FED. RES. BULL. 149 (1984).

In view of Congress's care not to discriminate among the States in crafting its *own* exception to the Douglas Amendment, it cannot possibly be thought to have empowered each State by implication to engage in such discrimination against other States when exercising the delegated authority to waive the Douglas Amendment's general prohibition.

reinstituted by the States it requires, *at the very least,* an express and unmistakable Act of Congress to that effect.[13]

Within the last few years alone this Court has held on four separate occasions that if Congress intends to delegate to the States its power to regulate interstate commerce, *even on a nondiscriminatory basis,* that intent must be "expressly stated" and "unmistakably clear." *South-Central Timber Development, Inc.* v. *Wunnicke,* 104 S.Ct. 2237, 2242 (1984); *Sporhase* v. *Nebraska,* 458 U.S. 941, 960 (1982); *New England Power Co.* v. *New Hampshire,* 455 U.S. 331, 343 (1982); *Lewis* v. *BT Investment Managers, Inc., supra,* 447 U.S. at 49.[14] The Douglas Amendment lacks any such language and, *a fortiori,* the Amendment does not authorize discrimination by one State against

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[13] We note that legislation which would have sanctioned the result respondents advocate was introduced by Senator Garn in 1983 and passed the Senate, but did not pass the House. S. 2851, 98th Cong., 2d Sess. § 903(2) (1984); *see also* Press Release of April 6, 1983 (A190-91).

Were Congress ever to adopt such a measure, and were it to provide for or result in the exclusion of particular States from any region, two serious constitutional issues would be posed: (1) Can even Congress itself place a particular State in commercial isolation, or would that contravene the Original Understanding of equality among members of the Union? (2) If Congress has such power, may it delegate that power to the States severally, or may such a decision be made only at the national level? The position advocated by intervenor-respondents and adopted by the Board and the court of appeals necessarily assumes, without even mentioning these novel and difficult questions, that Congress has such power and that it may be delegated. This Court would have to agree in order to affirm on the grounds stated below.

[14] Indeed, the Court held just last Term that even the Twenty-first Amendment, which on its face grants each State plenary power over the "importation" of alcoholic beverages, was insufficient to validate state legislation otherwise in conflict with the Commerce Clause. *Bacchus Imports, Ltd.* v. *Dias,* 104 S. Ct. 3049, 3057-59 (1984).

another—a concept wholly anathema to the Union created in 1789.[15]

III.

Application of the Plain Meaning of the Douglas Amendment Is the Only Means of Sustaining the Interstate Acts and Approving the Transactions.

Neither of the Interstate Acts purports on the enacting State's own authority to prohibit entry by bank holding companies from any other State. Rather, each is drafted as a waiver of the Douglas Amendment's federal prohibition with an effort to limit the effect of that waiver to entry from particular sister States. Had the purported limitations instead been drafted as actual prohibitions on entry from all but the favored States they would be invalid under the Commerce Clause.

The Solicitor General conceded in his Brief in Opposition for the Federal Respondent, November 6, 1984, at 5:

> "In the absence of congressional authorization there seems little doubt that state restrictions on interstate banking such as the ones in this case would run afoul of the Commerce Clause."

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[15] The principal weakness of the Confederation was its inability to regulate commerce in the face of parochial restrictions. THE FEDERALIST, Nos. 22 (Hamilton), 42 (Madison); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 14 (1824) (oral argument of Daniel Webster); *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 445-46 (1827) (Marshall, C.J.). Indeed, when it drafted the Commerce Clause the Constitutional Convention had before it a wealth of evidence of "rival, conflicting and angry regulations" passed by Connecticut, Maryland, New Jersey, New York, Pennsylvania and Virginia, which had the effect of fragmenting the Confederation into trading regions. *See* 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 547-48 (1911).

This Court held in *Lewis* v. *BT Investment Managers, Inc.*, *supra*, 447 U.S. at 49, that Section 7, the BHC Act's antipreemption provision, did not constitute congressional consent to otherwise unconstitutional state restrictions on interstate expansion by bank holding companies. The Court also stated with respect to the Douglas Amendment:

> "[I]t is doubtful that § 3(d) authorizes state restrictions of any nature on bank holding company activities. The language of the statute establishes a general federal prohibition on the acquisition or expansion of banking subsidiaries across state lines. The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited."

Id. at 47 (1980) (emphasis in the opinion).

Accordingly, the Interstate Acts can be sustained and the Transactions approved only by applying the Douglas Amendment in accordance with its plain meaning—the consent given by the Interstate Acts to entry by "an out-of-State bank holding company" operates as a complete waiver of the federal prohibition as to entry from all States, and the Acts are therefore constitutional.[16]

IV.

Adoption of the Position Here Advanced Does Not Confront the States With an "All or Nothing" Choice Regarding Out-of-State Bank Holding Companies.

The principal reason advanced by the Board (6a) in declining to read the Douglas Amendment as it is plainly

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[16] *See also* footnote 13, at page 18, *supra*.

written was that the plain language of the Amendment, if given effect,

> "would transform the numerous state statutes that allow acquisition of banks by limited classes of out-of-state bank holding companies into unlimited-entry statutes."

The Board also suggested that accepting Bank of New York's position might somehow call into question the Board's prior approval of applications made in accordance with these statutes. (5a-6a). This second concern was entirely misplaced, since under Bank of New York's analysis no state statute waiving the Douglas Amendment's prohibition, or Board action pursuant to such a statute, would be at all questionable. The first concern is also, on analysis, mistaken.

Each of the various types of statutes mentioned by the Board is a simple waiver of the Douglas Amendment's federal prohibition, accompanied by certain regulations or prohibitions enacted as part of the State's own law. As this Court recognized in *Lewis*, Section 7 of the Act "reserve[s] to the States a general power to enact regulations applicable to bank holding companies," so long as that power is exercised "within the boundaries of the Commerce Clause" and is "not inconsistent with the Act." 447 U.S. at 48-49. Under the standard set forth in *Lewis*, state legislation affecting bank holding companies which is not inconsistent with federal law may be valid if it affects interstate and local holding companies equally, or if any "disparate burden" placed on interstate holding companies is only "incidental" and not excessive in relation to the local benefit secured. 447 U.S. at 43; *Pike* v. *Bruce Church, Inc.*, 397 U.S. 131, 142 (1970).

One important category of state statutes restricting out-of-state holding companies, those prohibiting entry unless

the holding company's home State also allows entry from the State in question, are clearly constitutional under this standard.[17] Such statutes promote rather than restrain interstate commerce, and relief from them is available through a holding company's home-state legislature. Similar statutes have been consistently upheld by this Court. *See, e.g., Bode* v. *Barrett,* 344 U.S. 583, 586 (1953) (abatement of highway use taxes); *New York* v. *O'Neill,* 359 U.S. 1, 11 (1959) (attendance of out-of-state witnesses); *United States Steel Corp.* v. *Multistate Tax Comm'n,* 434 U.S. 452, 469-70 (1978) (equitable taxation of multistate businesses). Likewise, the Iowa statute at issue in *Iowa Independent Bankers, supra,*[18] was a simple "grandfather" provision, putting all bank holding companies then doing business in the State of Iowa on an equal basis. Again, similar statutes have been held valid by this Court for years. *See, e.g., United States* v. *Maryland Savings Share Ins. Corp.,* 400 U.S. 4 (1970) (per curiam); *Watson* v. *Maryland,* 218 U.S. 173 (1910).

Statutes which regulate the in-state activities of out-of-state bank holding companies, such as the Delaware and South Dakota laws, DEL. CODE ANN. tit. 5, §§ 801 *et seq.* (Supp. 1984) (authorizing acquisition by out-of-state bank holding companies of Delaware state banks, and then imposing restrictions, *inter alia,* as to manner of operation, so as to encourage location of wholesale banking operations in Delaware); S.D. CODIFIED LAWS ANN. § 51-16-41 (Supp. 1984) (same statutory structure, but designed to attract bank credit card operations), may also pass muster

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[17] *See* N.Y. BANKING LAW § 142-b (Supp. 1983); *cf.* R.I. GEN. LAWS § 19-30-2 (Supp. 1984) (full reciprocity after two-year period of regional limitation).

[18] IOWA CODE § 524.1805 (Supp. 1984).

under Section 7 and the Commerce Clause, if the burden they impose is not disproportionate to the legitimate (*i.e.*, nonprotectionist) local benefits they achieve. *See Lewis* v. *BT Investment Managers, Inc., supra,* 447 U.S. at 43.[19]

While the validity of the various state regulations and prohibitions to which the Board had reference is not here in issue, and is, in any event, irrelevant to the interpretation of the Douglas Amendment, many of them are well within the States' reserved powers under Section 7. However they may be viewed, affirmance of the court of appeals based on the analysis set forth herein confirms, rather than questions, both the validity of the waiver provisions of these statutes and of the Board's past approvals of transactions initiated in accordance with those provisions.

Conclusion

If the Douglas Amendment is properly read, the Interstate Acts withstand constitutional scrutiny because they do not result in discrimination and thus do not raise constitutional issues. As discussed in Points I and II, under the plain language of the Douglas Amendment, the Inter-

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[19] The Board itself remarked, in approving a bank holding company's application to establish a "credit card" bank in Nevada, that "such statutes do not raise the serious constitutional questions under the Commerce Clause that are posed when states discriminate against other states" through "regional banking compacts." *Citicorp,* 71 FED. RES. BULL. 101, 103 (1985).

The Board's desire to hold such restrictions valid under the Douglas Amendment, without reference to Section 7 and the Commerce Clause, is nonetheless puzzling in light of the Board's strongly expressed concern that legislation of this sort by certain States—which seek to attract major money center bank holding companies for limited purposes, largely by offering lower tax rates—is prejudicial to the public interest in "a stable and sound banking system locally and nationwide" and will, if not checked, produce "a serious impairment of banking standards." *Id.*

state Acts' attempts at discriminatory waivers are ineffective as a matter of federal statutory law; any waiver of the Amendment's prohibition on acquisition of local banks by out-of-state bank holding companies is a waiver as to entry from any other State.

By reading the Douglas Amendment in accordance with its plain meaning, this Court can prevent a conflict with the basic principles of the Constitution and at the same time avoid the unnecessary resolution of any constitutional issues. Under these circumstances, there can be no reason to reject the precise language which Congress used. Accordingly, the judgment of the court of appeals should be affirmed for the reasons, and based on the analysis, stated herein.

Respectfully submitted,

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February 21, 1985

ADDENDUM

Order of the Board of Governors of the Federal Reserve System Denying the Application of The Bank of New York Company, Inc. To Acquire the Subsidiary Banks of Northeast Bancorp, Inc. (May 15, 1984)

Order Denying Acquisition of a Bank Holding Company

Bank of New York Company, Inc., New York, New York ("BNY"), a bank holding company within the meaning of the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1841 *et seq.*) ("Act"), has applied for the Board's approval under section 3(a) of the Act (12 U.S.C. § 1842 (a)) to acquire 95.3 percent of the voting shares of Northeast Bancorp, Inc., New Haven, Connecticut ("Northeast"), also a bank holding company under the Act. BNY would thereby acquire control of Northeast's subsidiary banks, Union Trust Company, Stamford, Connecticut, and Security Bank and Trust, Waterbury, Connecticut. BNY has also applied under section 4(c)(8) of the Act (12 U.S.C. § 1843(c)(8)) and section 225.23(a)(2) of the Board's Regulation Y (12 C.F.R. § 225.23(a)(2)) to acquire Northeast's nonbank subsidiaries, NBI Mortgage Investment Corporation and Union Financial Services Corporation, both of New Haven, Connecticut.

Notice of the applications, affording opportunity for interested persons to submit comments, has been given in accordance with sections 3 and 4 of the Act. (49 *Federal Register* 9618, 10580 (1984)). The time for filing comments has expired, and the Board has received comments from Bank of New England Corporation, Boston, Massachusetts, CBT Corporation, Hartford, Connecticut, and the Independent Bankers Association of America. In addition, the State of Connecticut has recommended denial of the

application, thus triggering the requirement in section 3(b) of the Act for a hearing on the application. The State of Connecticut has waived its rights to an immediate hearing in order to permit the Board to evaluate whether this proposed interstate acquisition would be permissible under the Douglas Amendment, before considering the substantive merits of the application.[1] BNY has agreed to this procedure.

Connecticut has enacted a regional interstate banking statute that, by its terms, allows bank holding companies located only in those New England states that have passed interstate banking laws similar to that enacted by Connecticut to acquire banks located in Connecticut.[2] BNY argues that, in enacting this statute authorizing the acquisition of Connecticut banks by other New England bank

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[1] The Douglas Amendment provides that:

> [N]o application . . . shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on the effective date of this amendment or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest. 12 U.S.C. § 1842(d).

[2] 1983 Conn. Acts. 411 (Reg. Sess.). In view of the Board's findings in this Order regarding the Douglas Amendment, the Board has not considered other provisions of the Connecticut statute that may prohibit this acquisition.

holding companies, Connecticut has eliminated the federal bar of the Douglas Amendment to acquisition of Connecticut banks by all other out-of-state bank holding companies. BNY asserts that, under the literal terms of the Douglas Amendment, once a state allows *any* out-of-state bank holding company to purchase a bank within the state, the state has authorized the acquisition of banks in the state by *all* bank holding companies, wherever located. Under BNY's reading of the Douglas Amendment, even those New York holding companies that the Connecticut statute was designed to exclude, such as BNY, would be eligible to acquire a bank in Connecticut.

The State of Connecticut and the other protestants argue that the Douglas Amendment authorizes the states to limit acquisitions of banks within a state to out-of-state bank holding companies located in specified states and that, in any event, BNY's interpretation is inconsistent with the meaning and commonly accepted understanding of the Douglas Amendment, its legislative history, and prior Board and judicial construction of its terms.

The Board has considered the arguments advanced by BNY in support of its position. BNY bases its position almost entirely on textual analysis of the Douglas Amendment's provision that grants the states authority to remove the federal bar on interstate acquisitions. The Douglas Amendment prohibits an out-of-state bank holding company from acquiring a bank located in another state "unless the acquisition of such shares or assets of a State bank by *an* out-of-state bank holding company is specifically authorized . . ." (emphasis supplied). BNY asserts that Congress, in using the indefinite article "an," rather than a restrictive modifier like "such," intended that a state statute that authorized acquisition of a bank in the state by "any" or "a

single" out-of-state bank holding company would remove the Douglas Amendment's prohibition on interstate acquisitions by bank holding companies of banks in that state.

The Board is not convinced that the use of the article "an" should be accorded such decisive weight as suggested by BNY, particularly where such a reading would be contrary to the commonly accepted and understood interpretation of the Douglas Amendment, the legislative history and purposes of the Amendment, and Board and judicial practice in applying the Amendment. The Board believes that the article "an" must be read in the context of the entire state authorization provision in the Douglas Amendment. Based on the terms and structure of the Act and its purposes, the Board concludes that the phrase "unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized . . ." contained in the Douglas Amendment must be read, as the courts[3] and the Board have previously read the phrase, to refer to the specific acquisition or type of acquisition for which Board approval is sought under the Act.

In this regard, the language of the Douglas Amendment, in requiring that interstate bank acquisitions by out-of-state bank holding companies be authorized by a state's statute laws "by language to that effect and not merely by implication," reflects a Congressional concern that the states make a deliberate and express decision with respect to interstate banking. This clause of the Douglas Amendment is inconsistent with a reading, such as that proposed by BNY, that would undermine a state's policy determinations by causing the states inadvertently to allow unlimited interstate bank acquisitions.

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[3] *See Iowa Independent Bankers Association* v. *Board of Governors of the Federal Reserve System*, 511 F.2d 1288, 1296 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975).

Addendum

In effect, BNY's argument would compel the states to adopt an "all or nothing" approach in permitting the entry of out-of-state bank holding companies.[4] The Board has recently considered this issue and concluded: "Nothing in the history of the Douglas Amendment suggests that the states were to be permitted only to choose between not allowing out-of-state bank holding companies to enter, and allowing completely free entry."[5] Similarly, the United States Court of Appeals for the District of Columbia Circuit, the only court to examine this issue, has stated that it was "obvious" that "the intent of the Douglas Amendment was to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy" and that adoption of an interpretation similar to that urged by BNY in this case "would rob the states of this power." *Iowa Independent Bankers, supra,* 511 F.2d at 1297.[6] The court also noted that "nothing in the language of [the Douglas Amendment] points to [the] result" that "the states can only decide whether to extend the right to acquire in-state banks to all out-of-state bank holding companies or to prohibit such acquisitions entirely." *Id.* at 1296.

The states and the Board have consistently construed the Douglas Amendment to authorize the states to limit or to restrict entry by out-of-state bank holding companies.

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[4] *Bank of New England Corporation,* 70 FEDERAL RESERVE BULLETIN 374 (1984).

[5] *Id.* at 386.

[6] In *Conference of State Bank Supervisors* v. *Conover,* 715 F.2d 604, 615 (D.C. Cir. 1983), *cert. denied,* 52 U.S.L.W. 3720 (U.S. April 2, 1984), the court reaffirmed its reading of the authority granted to the states under the Douglas Amendment.

Addendum

The Board has approved a number of applications under statutes that admit only certain bank holding companies or that admit bank holding companies only under certain circumstances and that exclude all other bank holding companies. For example, the Board has considered the Douglas Amendment in acting upon applications by "grandfathered" out-of-state bank holding companies, by holding companies seeking to acquire limited purpose "credit card" banks in other states, by holding companies seeking to acquire failing out-of-state banks and, most recently, by holding companies seeking to acquire out-of-state banks pursuant to reciprocal or regional interstate banking statutes.[7] With respect to regional interstate banking statutes, the Board considered whether the discrimination inherent in such statutes against bank holding companies located in certain states is permissible under the Douglas Amendment and the United States Constitution. The Board concluded that, while the issue is not free from doubt, there is no clear and unequivocal basis to find these statutes to be inconsistent with the Constitution.

BNY's interpretation of the Douglas Amendment would transform the numerous state statutes that allow acquisition of banks by limited classes of out-of-state bank holding companies into unlimited-entry statutes. BNY's argument, if accepted, would cause full interstate banking in those states, a result contrary to the Congressional intent underlying the Douglas Amendment of allowing the states to apply their own policies regarding interstate banking to the ac-

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[7] *See, e.g., Northwest Bancorporation,* 38 *Federal Register* 21530 (1973); *Citicorp,* 67 FEDERAL RESERVE BULLETIN 181 (1981); *BankAmerica Corp.,* 69 FEDERAL RESERVE BULLETIN 568 (1983); *Key Banks, Inc.,* 70 FEDERAL RESERVE BULLETIN 57 (1984); *Bank of New England Corporation,* 70 FEDERAL RESERVE BULLETIN 374 (1984).

quisition by out-of-state bank holding companies of banks located within the borders of a state. Such a sweeping reinterpretation of the Douglas Amendment should appropriately be accomplished only by legislative action.

For the foregoing reasons, the Board concludes that the Douglas Amendment prohibits the Board from approving BNY's proposed acquisition of Northeast, and BNY's application to acquire Northeast pursuant to section 3(a) of the Act is hereby denied.[8]

The Board's denial of this application is based upon its reading of the text and purposes of the Douglas Amendment, and nothing in this Order is intended to modify the views previously expressed by the Board concerning interstate banking on a regional, reciprocal basis.[9] As the Board noted in its *Bank of New England Corporation* Order, interstate banking is a highly complex issue that involves the balancing of a number of different considerations. However, if the New England regional approach to interstate banking is emulated in other parts of the country, there is a potential danger that the result could be to divide the country into a number of banking regions. The Board believes that the public policy issues that are raised by the regional approach are inherently national and would be best resolved by Congressional action.

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[8] The Board notes that BNY is not prohibited from acquiring Northeast's nonbanking subsidiaries, but it denies the application of BNY to acquire these subsidiaries pursuant to section 4(c)(8) of the Act since there is no indication that BNY intended to have the Board decide the proposed acquisition of Northeast's nonbanking subsidiaries on a separate basis.

[9] *Bank of New England Corporation, supra,* 70 FEDERAL RESERVE BULLETIN at 379.

Addendum

By order of the Board of Governors, effective May 15, 1984.

Voting for this action: Chairman Volcker and Governors Martin, Partee, Teeters, Rice, and Gramley. Absent and not voting: Governor Wallich.

JAMES MCAFEE
Associate Secretary of the Board

[SEAL]